Supreme Court, U.S.

001060 DEC 29 2000

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No.

In the Supreme Court of the United States

KEVIN C. KONWINSKI,
Petitioner

v.

JOHN DALTON, Secretary of the Navy, VICE ADMIRAL DANIEL T. OLIVER, Chief of Naval Personnel, CAPTAIN L. V. MACHETTE, Commanding Officer, Naval Construction Battalion Center Gulfport, LCDR R. E. MILLER, Officer in Charge, Personnel Support Detachment
Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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Petition for Writ of Certiorari

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80 pp

QUESTIONS PRESENTED FOR REVIEW

I. Whether the Fifth Circuit Could Properly Affirm the District Court's Finding that the Claim Was Non-Justiciable When Petitioner Asserted a Constitutional Violation and Possessed a Sufficient Property and Liberty Interest in His Military Career to Implicate the Due Process Clause.

II. Whether the Fifth Circuit Could Properly Affirm the District Court's Finding that the Claim Was Non-Justiciable When Petitioner Was Discharged from the Navy Despite the Finding That He Did Not Commit Misconduct.

III. Whether the Navy Can Arbitrarily and Capriciously Discharge Petitioner.

IV. Whether the Navy Can Discharge Petitioner When the Decision Is Unsupported by Substantial Evidence.

V. Whether the Deference Afforded Military Decisions Should Attach to the Field Officers When Their Determinations Conflict With the Headquarters Staffs.

TABLE OF CONTENTS

Questions Presented for Review i

Table of Cited Authorities iv

Basis of Jurisdiction ix

Corporate Disclosure Statement ix

Pertinent Constitutional Provisions, Treaties, Statutes, Ordinances and Regulations x

Statement of the Case 1

Argument 4

I The Fifth Circuit Erred in Affirming the District Court's Finding that the Claim Was Non-Justiciable When Petitioner Asserted a Constitutional Violation and Possessed a Sufficient Property and Liberty Interest in His Military Career to Implicate the Due Process Clause. 4

II. The Fifth Circuit Erred in Affirming the District Court's Finding that the Claim Was Non-Justiciable When Petitioner Was Discharged from the United States Navy Despite the Administrative Board's Finding That He Did Not Commit Misconduct. .. 10

III. The Secretary of the Navy Cannot Arbitrarily and Capriciously Discharge Petitioner from the United States Navy 14

IV. The Secretary of the Navy Cannot Discharge Petitioner from the Navy When the Decision Is Unsupported by Substantial Evidence. 18

V. The Deference Afforded Military Decisions Should Attach to the Field Officers When Their Determinations Conflict With the Headquarters Staffs 21

Conclusion 27

Appendix

Decision of the United States Court of Appeals for the Fifth Circuit ..... Appendix 1

Memorandum Opinion And Order Denying Plaintiff's Request For Injunctive Relief, Granting Defendants' Motion to Dismiss or For Summary Judgement, Denying Plaintiff's Cross Motion For Summary Judgment, And Granting Defendants' Motion to Strike ..... Appendix 2

Final Judgment of the United States District Court for the Southern District of Mississippi . Appendix 31

Text of Pertinent Constitutional Provisions, Treaties, Statutes, Ordinances and Regulations ..... Appendix 33

TABLE OF CITED AUTHORITIES

Cases.

Board of Regents v. Roth, 408 U.S. 564 (1972) 6, 10

Boyd v. United States, 207 Ct.Cl. 1, 9 (1975), *cert. denied*, 424 U.S. 911, (1976) 23

Brooks v. United States, 213 Ct.Cl. 115 (1977) 23

Caiola v. Carroll, 851 F.2d 395 (D.C. Cir. 1988) 18

Casey v. United States 8 Cl.Ct. 234 (1985) 5

Cellular Tel. Co. v. Town of Oyster Bay, 166 F.3d 490 (2nd Cir. 1999) 18

Chapel v. Wallace, 462 U.S. 296 (1983) 22

Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971) 14

Cooney v. Dalton, 877 F. Supp. 508 (D.Hi. 1995) 16

Correa v. Clayton, 563 F.2d 397 (9th Cir. 1977) 5, 11

Crispino v. United States, 3 Cl.Ct. 306 (1983) 23

Dickinson v. Zurko, 527 U.S. 150 (1999) 19, 21

Dillard v. Brown, 65 F.2d 316 (3rd Cir. 1981) 4

Geiger v. Brown, 419 F.2d 714 (D. C. Cir. 1969) 13

Goldberg v. Kelly, 397 U.S. 254 (1970) 6,10

Greene v. McElroy, 360 U.S. 474 (1959) 9, 10

Greer v. Spock, 424 U.S. 828 (1976) 21

Guerra v. Scruggs, 942 F.2d 270 (4th Cir. 1991) 7

Harmon v. Brucker, 355 U.S. 579 (1958) 11, 14

Holley v. United States, 124 F.3d 1462 (Fed. Cir. 1997) .. 11

Horn v. Schlesinger, 514 F.2d 549 (8th Cir. 1975) 24

Jones v. Priebe, 489 F.2d 709 (6th Cir. 1973) 18

Matlovich v. Secretary of the Air Force, 591 F.2d 852 (D.C. Cir. 1978) 11

May v. Gray, 708 F.Supp. 716 (E.D. N.C. 1988) 6

Milas v. United States, 42 Fed. Cl. 704 (1999)., *aff'd* 217 F.3d 854 (Fed. Cir. 1999) 6

Motor Vehicle Mfrs Ass'n of U.S. Inc. v. State Farm Mut. Auto Ins. Co., 463 U.S. 29 (1983) 14, 17

Mullally v. United States, 95 F.3d 12 (8th Cir. 1996) 4

Northern Mont. Health Care Ctr. v. NLRB, 178 F.3d 1089 (9th Cir. 1999) 19

Nelson v. Miller, 373 F.2d 474 (3rd Cir. 1967), *cert. denied*, 387 U.S. 924 (1967) 24

O'Keefe's Inc. v. U. S. Consumer Product Safety Com'n, 92 F.3d 940 (9th Cir. 1996) 15

Padula v. Webster, 822 F.2d 97 (D.C.Cir.1987) 4

Perez v. United States, 850 F.Supp 1354 (N.D. Ill. 1994) 6, 7

Perry v. FBI, 781 F.2d 1294,-1300 (7th Cir. 1986) 5

Recording Industry Ass'n of America v. Copyright Royalty Tribunal, 662 F.2d 1 (C.A.D.C. 1981) 15

Rich v. Secretary of the Army, 735 F.2d 1220 (10th Cir 1984) 1

Rucker v. Secretary of the Air Force, 702 F.2d 966 (11th Cir. 1983) 11

Sanders v. United States 594 F.2d 804 (Ct. Cl. 1979) 24

Santa Fe Energy Products Co. v. McCutcheon, 90 F.3d 409 (10th Cir. 1996) 14

Sargisson v. United States, 913 F.2d 918, 921 (Fed. Cir. 1990) 11, 13

Service v. Dulles, 354 U.S. 363 (1957) 13, 14

Shell Offshore, Inc. v. Director, OWCP, 122 F.3d 312 (5th Cir.1997) 9

United States v. Gansemer, 38 M.J. 340 (C.M.A. 1993) ... 7

Universal Camera v. NLRB, 340 U.S. 474 (1951) ... 19, 21

Van Bourg v. Nitze, 388 F.2d 557 (D.C. Cir. 1967) 11

Virginia Agr. Growers Ass'n, Inc. v. Donovan, 774 F.2d 89 (4th Cir. 1985) 15

Wigginton v. Centracchio, 205 F.3d (1st Cir. 2000) 4

Statutes.

United States Constitution - Amendment V 4

5 U.S.C. § 702 3

5 U.S.C. § 706 3

10 U.S.C. § 890 25

10 U.S.C. § 1169 ..... 6, 7, 12, 13

28 U.S.C. § 1254 1

28 U.S.C. § 1291 3

28 U.S.C. § 1331 3

Rules of the Supreme Court of the United States.

Rule 10 ..... 10, 14, 21, 27

Rule 29.6 1

Other Authorities.

32 C.F.R. Pt. 41 App. A 12, 15, 16

32 C.F.R. 700.802 25

SECNAVINST 1910.4B 2, 12

MILPERSMAN 8, 16

BASIS FOR JUPISDICTION

These issues are properly before the Supreme Court of the United States pursuant to 28 U.S.C. § 1254 and Rule 10 of the Supreme Court rules which govern the review on Certiorari. The final judgment of the United States Court of Appeals for the Fifth Circuit was entered on October 6th, 2000. The submission for filing is within the 90 day requirement of Rule 13.1 of the Supreme Court Rules. This proceeding does not question the constitutionality of any Act of Congress or any State Legislature. Consequently, the provisions of Rule 29.4(b) and (c) do not apply.

CORPORATE DISCLOSURE STATEMENT

This document has not been filed on behalf of a nongovernmental corporation within the scope of Rule 29.6

PERTINENT CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS

The following constitutional provisions treaties, statutes, ordinances and regulations re applicable to this proceeding:

United States Constitution - Amendment V.

28 U.S.C. § 1254

5 U.S.C. § 702

5 U.S.C. § 706

10 U.S.C. § 890

10 U.S.C. § 1169

32 C.F.R. Pt. 41 App. A

32 C.F.R. 700.802

Manual for Courts-Martial

SECNAVINST 1910.4B

MILPERSMAN

The pertinent text of the above citations are set out in the appendix.

STATEMENT OF THE CASE

Since his enlistment in the Navy in 1984, petitioner Kevin Konwinski, a first class petty officer (E-6), had been a superior performer with an unblemished record. On June 9, 1997, he faced an administrative separation board because of a civilian conviction for indecent exposure. The board found that he did not commit misconduct required for discharge under the pertinent regulations and recommended retention. The Commanding Officer who convened the board concurred and filed the report. Over a year later, in July of 1998, the papers were discovered by a new Commanding Officer and forwarded to the Navy's Bureau of Personnel, recommending that petitioner be retained in the Navy. The Bureau reversed and without notice to petitioner or his Commanding Officer, forwarded a recommendation to the Assistant Secretary of the Navy for Manpower and Reserve Affairs that petitioner be discharged. This recommendation consisted of a one page memorandum which contained misleading information. The

Assistant Secretary, in contravention of his own regulations (SECNAVINST 1910.4B) ordered petitioner discharged.

The controversy arose out of an incident in January 1997 in Biloxi Mississippi. Petitioner was parked in the parking lot of a mall during a rainstorm. Having to urinate, he opened the door of his truck and relieved himself. A female passerby though he was masturbating. This led to a claim by a mall employee that petitioner was masturbating in his vehicle, an allegation petitioner vehemently denied. Evidence on both sides of the question was presented to the administrative discharge board who specifically found that petition had merely urinated. Consequently, the board found that Konwinski did not meet the criteria necessary for misconduct under the regulations.

Petitioner filed his instant action in the United States District Court for the Southern District of Mississippi pursuant to 28 U.S.C. § 1331 and 5 U.S.C. §§ 702 and 706 on October 5, 1998. The court issued a Temporary Restraining

Order on that date keeping petitioner on active duty. On August 24, 1999, the court granted defendant's Motion to Dismiss or in the Alternative for Summary Judgment. A timely notice of appeal was filed on September 14, 1999 seeking review pursuant to 28 U.S.C. § 1291. On October 6, 2000, the Fifth Circuit affirmed the trial court.

During the pendency of these actions petitioner was awarded the Navy Achievement Medal for superior performance of duty during a hurricane.

This case is related to the case of *Strickland v. Danzig,* which is also before this Court on a petition for *certiorari*. As in the instant case, Petty Officer Strickland was discharged despite the findings of an administrative discharge board and the recommendations of two operational Commanding Officers. Specifically the third fourth and fifth questions for review in this case are almost exactly on point with the *Strickland* case. There are also similarities in the first two questions for review.

ARGUMENT

I. The Fifth Circuit Erred in Affirming the District Court's Finding that the Claim Was Non-Justiciable When Petitioner Asserted a Constitutional Violation and Possessed a Sufficient Property and Liberty Interest in His Military Career to Implicate the Due Process Clause

The trial court found that petitioner's claims were non-justiciable, despite the existence of significant Constitutional claims. In affirming this finding, the Fifth Circuit ruling disagrees with the established precedent of several other Circuits who have found that military decisions alleged to be in violation of the Constitution are justiciable. *Wigginton v. Centracchio*, 205 F.3d (1st Cir. 2000); *Mullally v. United States*, 95 F.3d 12 (8th Cir. 1996); *Padula v. Webster*, 822 F.2d 97 (D.C.Cir.1987); *Dillard v. Brown*, 65 F.2d 316 (3rd Cir. 1981).

Enlistment into the armed forces of the United States does not constitute the abandonment of constitutional and statutory protection. There is no question that the United

States Constitution affords some protection from unfair or arbitrary administrative discharges. *Correa v. Clayton,* 563 F.2d 397, 399 (9th Cir. 1977). Review under the due process clause of the Constitution is limited to those instances where the plaintiff can demonstrate a liberty or property interest. In this case, Petty Officer Konwinski has both.

A liberty interest in governmental employment is implicated if the individual's good name, reputation, honor or integrity are at stake, or if the governmental action could impose a stigma or other liability that could prejudice other employment opportunities. *Perry v. FBI*, 781 F.2d 1294, 1300 (7th Cir. 1986). In the instant case, both prongs of the *Perry* test are met. This discharge placed Petty Officer Konwinski's reputation and good name at stake. The discharge certificate (DD-214) indicates that plaintiff's separation was a General discharge for "Misconduct." Additionally, the separation is sufficient stigma to invoke a liberty interest. *Casey v. United States* 8 Cl.Ct. 234 (1985).

See also, Perez v. United States, 850 F.Supp 1354 (N.D. Ill. 1994)., *Milas v. United States*, 42 Fed. Cl. 704 (1999), *aff'd* 217 F.3d 854 (Fed. Cir. 1999).

Petitioner also enjoys a property interest in his naval career. Property rights in government benefits, including employment benefits, are based on statutory eligibility. *Goldberg v. Kelly*, 397 U.S. 254 (1970). In *Goldberg*, the Supreme Court held that statutory entitlement can give rise to a property interest under the due process clause. This position was refined by the Court in *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). Here, this Court indicated that a "legitimate claim of entitlement" was the key in determining whether a property interest existed. *Id.*

Petty Officer Konwinski has an absolute right via statutory safeguards to due process of law. In *May v. Gray*, 708 F.Supp. 716 (E.D. N.C. 1988), the court relied on 10 U.S.C. § 1169 to distinguish the "at will" status of active duty officers and inactive reservists. Effectively, the *May* court

found that an active duty regular enlisted member has a Constitutionally recognized property interest and legitimate claim of entitlement to his or her job. *See also, Perez, supra. But see, Guerra v. Scruggs*, 942 F.2d 270 (4th Cir. 1991) and *Rich v. Secretary of the Army*, 735 F.2d 1220 (10th Cir 1984).

A failure to find a property interest in a military career is at odds with the Court of Military Appeals (now the United States Court of Appeals for the Armed Forces). In *United States v. Gansemer*, 38 M.J. 340, 341 (C.M.A. 1993), that court found that "[w]ith regard to administrative-discharge procedures, a servicemember is afforded many due process protections, mostly spelled out in service regulations but having their foundation in the Constitutional principle that no person may be deprived of property without due process of law." 38 M.J. 341. The military court also noted that, pursuant to 10 U.S.C. § 1169, an administrative discharge must be based on appropriate authority. *Id.*

One of the more draconian actions taken against Konwinski to deprive him of his liberty and property interest was the proceeding held by the secretary which resulted in the reversal of the findings of the administrative discharge board and the two operational Commanding Officers. A one page memorandum which falsely represented that Konwinski was masturbating was presented to the Assistant Secretary along with an *ex parte* briefing conducted without notice or knowledge of the petitioner. This "star chamber" proceeding was constitutionally suspect and defective under existing regulations. The Military Personnel Manual (MILPERSMAN) allows the respondent to obtain copies of all documents forwarded to the separation authority. This, of course, would allow the servicemember an opportunity to submit a written statement to be considered by the separation authority or even to ask for a personal audience. The agency denied petitioner this right. He was not even notified that the matter was referred to the Secretary of the Navy. Nor was he

provided with the documents submitted by the Bureau of Naval Personnel in support of the discharge request until the action was filed in the court below.

Notice and an opportunity to be heard at a meaningful time and in a meaningful manner are essential elements of due process. *Shell Offshore, Inc. v. Director, OWCP*, 122 F.3d 312, 315 (5th Cir.1997). Here Konwinski was denied an opportunity to present his case to the Secretary of the Navy.

The Navy's refusal to provide Konwinski with a copy of the memorandum forwarded to the Secretary of the Navy was also a breach of due process. This is in contravention of the United States Supreme Court ruling in *Greene v. McElroy*, 360 U.S. 474 (1959). In *Greene*, this Court held that "where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue." *Greene*, 360 U.S. at

496.

Accordingly, Konwinski has standing to assert a Constitutional question. The Fifth Circuit erred in affirming the district court's finding of non-justiciability. In doing so they disagreed with the law in force in the First, Third and Eighth Circuits and the military court of last resort. Pursuant to Rule 10(a), this matter is appropriate for certiorari. Additionally, the Fifth Circuit has conflicted with this Court's rulings in *Greene*, *Goldberg* and Board of *Regents, supra.* to the extent that review is proper under Rule 10(c).

II. The Fifth Circuit Erred in Affirming the District Court's Finding that the Claim Was Non-Justiciable When Petitioner Was Discharged from the United States Navy Despite the Administrative Board's Finding That He Did Not Commit Misconduct

In affirming the findings of the trial court that the petitioner's improper discharge claim was non-justiciable, the Fifth Circuit ruled contrary to the precedents of this Court and many other Circuits. The federal courts unquestionably have jurisdiction to review military discharge proceedings to

determine whether an official acted outside of the scope of his powers. *Harmon v. Brucker*, 355 U.S. 579 (1958). Additionally, the federal courts may review the fairness and reasonableness of decisions resulting therefrom. *Van Bourg v. Nitze*, 388 F.2d 557 (D.C. Cir. 1967); *Correa v. Clayton*, *supra*. Federal courts routinely review cases in which it is alleged that the military services have failed to follow their own rules, regulations, policies, or procedures. *Matlovich v. Secretary of the Air Force*, 591 F.2d 852 (D.C. Cir. 1978); *Rucker v. Secretary of the Air Force*, 702 F.2d 966 (11th Cir. 1983). *Sargisson v. United States*, 913 F.2d 918, 921 (Fed. Cir. 1990). Issues concerning discharge procedures are not one of achieving legitimate military ends, but a matter of compliance with law. Review of compliance with statute, regulation, and the Constitution is the judicial responsibility. *Holley v. United States*, 124 F.3d 1462 (Fed. Cir. 1997).

In the instant case, the administrative board found "no misconduct." By the Secretary's regulations, once that

occurred, petitioner could not be discharged for misconduct. Congress protected regular enlisted members from arbitrary or summary discharges. 10 U.S.C. § 1169. Absent the sentence of a court-martial, a regular enlisted member such as Konwinski could only be discharged pursuant to the regulations promulgated by the Secretary concerned. The appropriate regulations are 32 C.F.R. Pt. 41 App. A and SECNAVINST 1910.4B. The SECNAVINST notes that "[i]f the Board finds a preponderance of evidence does not support one or more of the reasons for separation alleged and recommends retention *the separation authority cannot separate the servicemembers for that alleged reason.*" (emphasis added). The plain language of the instruction prohibits the separation of the plaintiff for the reasons considered and rejected by the administrative board. The only exceptions to this policy are for fraud and collusion, which have not been alleged here. Even assuming, *arguendo* that the board's no misconduct finding was *ultra vires*, there

is no jury nullification exception in the instruction. Had the Secretary of the Navy wished to codify a nullification exception he had the opportunity to do so. Until he exercises this option, if he ever does, the plain language of the directive controls.

The Secretary of the Navy, while enjoying broad authority to discharge his personnel, must follow the law and his own regulations. *Geiger v. Brown*, 419 F.2d 714 (D. C. Cir. 1969); *Sargisson, supra.* 913 F.2d at 921. Congress requires all service personnel, including the Chief of Naval Personnel, to follow the regulations prescribed by the Secretary of Defense and the Secretary of the Navy. 10 U.S.C. § 1169. In the instant case, however, the reviewing and separation authorities have defied the will of Congress, the Secretary of Defense and their own directives. When, as here, constitutional rights are implicated, agencies must follow their regulations. *Service v. Dulles*, 354 U.S. 363 (1957).

Here the Fifth Circuit is in conflict with a number of other Circuits including the 9th, 11th, District of Columbia and Federal Circuits. Accordingly a review under Rule 10(a) is warranted. Additionally, the Fifth Circuit has conflicted with this Court's rulings in *Harmon* and *Service*, *supra*. to the extent that review is proper under Rule 10(c). If this Court does not grant the petition for a writ of certiorari, there will be confusion on the justiciability of future actions brought under the Administrative Procedures Act.

III. The Secretary of the Navy Cannot Arbitrarily and Capriciously Discharge Petitioner from the United States Navy

It is well settled in the jurisprudence of this Court and the other Appellate Circuits that an agency cannot act arbitrarily and capriciously in performing their functions. *Motor Vehicle Mfrs Ass'n of U.S. Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29 (1983); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971); *Santa Fe Energy Products Co. v. McCutcheon*, 90 F.3d 409 (10th Cir.

1996). A court must ascertain the facts on which the agency made its decision, determine whether those facts have some basis in the record and judge whether a reasonable decision maker could respond to the facts as the agency did. *Recording Industry Ass'n of America v. Copyright Royalty Tribunal*, 662 F.2d 1 (C.A.D.C. 1981). The Court must also determine whether the agency's decision was based on the consideration of relevant factors and whether there was a clear error of judgment. *Virginia Agr. Growers Ass'n, Inc. v. Donovan*, 774 F.2d 89 (4th Cir. 1985). *See also, O'Keefe's Inc. v. U. S. Consumer Product Safety Com'n*, 92 F.3d 940 (9th Cir. 1996). In the instant case, the Secretary acted arbitrarily and capriciously in discharging petitioner. By affirming the trial court's findings the Fifth Circuit abrogated the standards of this Court and many other Circuits.

The Secretary failed to consider Konwinski's potential for rehabilitation as required by 32 C.F.R. Pt. 41 App. A. Although the court below found that this contention

was without merit, they gave no reasoning to support their basis for this decision. Consideration of the potential for rehabilitation is an absolute requirement, when, as here, separation is not mandatory. Thus the Secretary was required to consider the potential for rehabilitation. When, as here, the record does not reveal that the separation authority considered the member's potential for rehabilitation, then there is a serious question raised as to whether the Navy complied with their own regulations. *Cooney v. Dalton,* 877 F. Supp. 508, 513 (D.Hi. 1995).

The separation authority also failed to consider the six retention factors delineated in 32 C.F.R. Pt. 41 App. A, part 2(A)(2).[1] The Secretary of Defense stated that the separation authority "should" consider the six factors. The implication of this provision is that these six factors constitute a non-inclusive list. If consideration of these criteria are not

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[1] The factors were repeated in the Military Personnel Manual (MILPERSMAN).

required then the separation authority must still articulate what criteria were considered. At a minimum, a failure to consider the criteria enumerated by the Secretary of Defense, absent some sort of reasoned analysis, would be an arbitrary and capricious action. The trial court found that there is no requirement to consider specific factors unless they are mandatory. This is in contravention of this Court's holding that an agency's decision is arbitrary and capricious if it entirely fails to consider an important aspect of the problem. *Motor Vehicles Mfrs. Ass'n* supra., 463 U.S. at 43. Here, the question of whether Konwinski should be retained was the central issue. The Assistant Secretary, however, failed to consider the retention factors which went to the core of the issue. Had he done so, the outcome of this case would have changed significantly since the factors weigh heavily in favor of Konwinski's retention. Notably, the second Commanding Officer based his call for keeping Konwinski, in part, on the

retention factors.[2]

The Fifth Circuit is in conflict with a number of other Circuits including the 4th, 9th, 10th and District of Columbia Circuits. Accordingly a review under Rule 10(a) is appropriate. Additionally, the Fifth Circuit has conflicted with this Court's rulings to the extent that review is proper under Rule 10(c). If this Court does not grant the petition for a writ of certiorari, there will be confusion on a subject that goes to the heart of constitutional due process and fair play.

IV. The Secretary of the Navy Cannot Discharge Petitioner from the Navy When the Decision Is Unsupported by Substantial Evidence

The jurisprudence of this court and the various Circuits has consistently held that an agency's decision must be supported by substantial evidence. *Caiola v. Carroll*, 851 F.2d 395 (D.C. Cir. 1988); *Cellular Tel. Co. v. Town of Oyster Bay*, 166 F.3d 490 (2nd Cir. 1999); *Jones v. Priebe*,

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[2] See Commanding Officer's letter quoted verbatim in the district court decision at Appendix 12).

489 F.2d 709 (6th Cir. 1973); *Northern Mont. Health Care Ctr. V. NLRB*, 178 F.3d 1089 (9th Cir. 1999). Substantial evidence requires evidence that a reasonable mind might accept as adequate to support a conclusion. *Universal Camera v. NLRB*, 340 U.S. 474 (1951). This requires a court to ask whether a "reasonable mind might accept a particular evidentiary record" to support the decision. *Dickinson v. Zurko*, 527 U.S. 150 (1999).

The basis for the discharge proceeding was the allegation that Konwinski had been masturbating inside of his truck. This issue was fairly litigated at the administrative discharge board. The government presented an unsworn statement of a store employee who claims that he was told Konwinski was masturbating and that he later saw him masturbating. Konwinski presented his sworn testimony that he was not masturbating. Additionally evidence was presented to show that Konwinski's clothing was not disheveled and that the tinting on the vehicle's window

would have made observations by the store employee unlikely. Konwinski's superior service record was also presented as an indication that he did not practice this type of misconduct. The administrative discharge board made a specific finding that Konwinski did not masturbate. The board considered all evidence including the civilian conviction and determined that the preponderance of evidence did not support the proposition that the specific circumstances of the offense warranted separation.

In substituting their judgment for the finder of fact, to the prejudice of the appellant, the reviewing and separation authority failed to justify their decision. There was no recitation of what evidence, if any, was relied upon to overturn the board's well reasoned findings. Only a single one-page memorandum, rife with inaccuracies, appears in the record to justify the actions of the agency. Consequently, the court below erred in not finding that the agency decision was unsupported by substantial evidence.

The Fifth Circuit is in conflict with a number of other Circuits including the 2nd, 6th, 9th and District of Columbia Circuits. Accordingly a review under Rule 10(a) is warranted. Additionally, the Fifth Circuit has conflicted with this Court's rulings in *Universal Camera* and *Dickinson v. Zurko*, *supra.*, to the extent that review is proper under Rule 10(c). If this Court does not grant the petition for a writ of certiorari, there will be confusion on a subject that goes to the heart of judicial review under the Administrative Procedures Act.

V. The Deference Afforded Military Decisions Should Attach to the Field Officers When Their Determinations Conflict With the Headquarters Staffs

The purpose behind the deference to military authorities is the need of the military to accomplish its mission by fostering instinctive obedience, unity, commitment, and esprit de corps. *Greer v. Spock*, 424 U.S. 828, 843-844 (1976) (POWELL, J., concurring). Additionally it is difficult for courts to determine the impact upon

discipline of any particular decision. *Chapel v. Wallace*, 462 U.S. 296, 305 (1983). In the instant case, there is tension between two levels of the chain of command. On one side the operational forces felt that retaining Konwinski would best benefit overall unity, commitment, esprit de corps and discipline. This sentiment was not shared by the Bureau of Personnel several hundred miles away in Millington Tennessee or the Secretariat, a thousand miles away in Washington. The ruling of the courts below rested the discretion with the headquarters staffs who are far removed from the units. Petitioner argues that the discretion must remain with the operational Commanding Officers. This appears to be a case of first impression and the court must decide at what level the deference properly lies.

Certainly an administrative board as the finder of fact must be allowed to exercise discretion. Otherwise the board would be useless surplusage rather than real due process. In

effect the Secretary and the courts below substituted their judgment for that of the administrative discharge board. It is well settled that a presumption of regularity attached to the members of the administrative discharge board. *Brooks v. United States*, 213 Ct.Cl. 115, 121 (1977); *Boyd v. United States*, 207 Ct.Cl. 1, 9 (1975), *cert. denied*, 424 U.S. 911, (1976); *Crispino v. United States*, 3 Cl.Ct. 306, 312 (1983). Only the administrative board is empowered to make the finding as to whether misconduct occurred. No regulation grants a reviewing or separation authority the right to make a *de novo* review of that finding. Since the record does not reveal any evidence of bad faith on the part of the administrative board members, and in fact does reveal a reasonable explanation for their actions, then the court below cannot disturb their finding of no misconduct.

While there is no documented case law discussing a reversal of an administrative discharge board by the Secretary, there is ample authority concerning reversals of

other administrative bodies such as record correction boards. In overturning a correction board, the Secretary must not act in an arbitrary, capricious manner, unsupported by substantial evidence, or in violation of law. The actions of the Secretary are subject to judicial reversal for violation of such standards. *Sanders v. United States* 594 F.2d 804 (Ct. Cl. 1979). The Secretary can only reverse a correction board based on explicitly stated policy reasons, or upon evidence presented in the record made to the Board. *Horn v. Schlesinger*, 514 F.2d 549, 553 (8th Cir. 1975). *See also*, *Nelson* v. Miller, 373 F.2d 474, 478 (3rd Cir. 1967), *cert. denied*, 387 U.S. 924 (1967). In the instant case, the Secretary improperly based his decision on a memorandum that was not made available to the board or to Konwinski and an *ex parte* briefing from non-board members.

No one contests the need for judicial deference to military discretion and expertise. It is not the place of the courts to adjudicate an operatonal Commanding Officer's

orders. The will of Congress is that military orders be obeyed promptly and completely. *See, e.g.* 10 U.S.C. 890. Otherwise, lives will be lost and tactical opportunities missed while a judicial debate rages. The question is - at what level should the deference attach.

For the judicial deference to be most effective, it must attach to field commanders. They are the people closest to the problem and those charged with solving those problems. The Navy has given their Commanding Officers ultimate responsibility for their commands. 32 C.F.R. 700.802(a). This includes the authority to depart from his or her orders and instructions, upon his own responsibility. 32 C.F.R. 700.802(b). No other officer at any level of the chain of command is tasked with the ultimate responsibility for his command. Consequently, the deference must be at its highest point when reviewing the decisions of an operational Commanding Officer and at its lowest point when scrutinizing those who overrule his decisions.

With due respect to the Secretary and to the Bureau of personnel, they were not the finders of fact and did not see the evidence or testimony in this case. The administrative board and the Commanding Officers saw that evidence. More importantly, they had a greater opportunity to review the circumstances of this case and to observe and evaluate Konwinski. Consequently, when as, here, the evaluation of the Commanding Officers and the administrative boards conflict with the evaluation of the headquarters staffs, courts must give great deference to the operational Commanding Officers and require those who would reverse them to demonstrate a significant policy reason for doing so. To rule otherwise would be to undermine the authority of operational Commanding Officers. This could result in those in command choosing to exercise timidity rather than initiative and leadership in operational situations. The willingness of operational Commanding Officers to assert initiative, often in opposition to guidance issued by headquarters staffs has

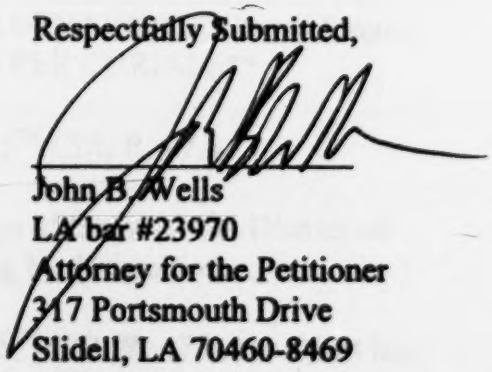
played a significant role in domination of the battlespace by the United States military. This Court should foster that history and tradition by ruling that judicial deference is strongest when reviewing the decisions of operational Commanding Officers.

Since this important area of the law is unsettled, granting certiorari is appropriate pursuant to Rule 10(c).

CONCLUSION

For the reasons delineated herein, petition prays that a writ of certiorari be issued to the United States Court of Appeals for the Fifth Circuit.

Respectfully Submitted,



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UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-60640

KEVIN C. KONWINSKI,

Plaintiff-Appellant

versus

JOHN DALTON, Secretary of the Navy; L. V. MACHETTE, Captain, Commanding Officer; R. E. MILLER, Officer in Charge, Personnel Support Detachment DANIEL T. OLIVER

Defendants-Appellees

Appeal from the United States District Court
for the Southern District of Mississippi
(1:98-CV-458-RG)

Before BARKSDALE, and BENAVIDES, Circuit Judges, and VELA,* District Judge PER CURIAM:**

AFFIRMED. See 5TH CIR. R. 47.6

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(1) District Judge of the Southern District of Texas, sitting by designation.

(2) Pursuant to 5TH CIR. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

KEVIN C. KONWINSKI
PLAINTIFF

VERSUS

CIVIL ACTION NO.
1:98-CV-458 RG

JOHN DALTON, Secretary
of the Navy, et al.
DEFENDANTS

MEMORANDUM OPINION AND ORDER DENYING PLAINTIFF'S REQUEST FOR INJUNCTIVE RELIEF, GRANTING DEFENDANTS' MOTION TO DISMISS OR FOR SUMMARY JUDGEMENT, DENYING PLAINTIFF'S CROSS MOTION FOR SUMMARY JUDGMENT, AND GRANTING DEFENDANTS' MOTION TO STRIKE

Before the Court is the Complaint filed by the Plaintiff, Kevin C. Konwinski, requesting a Temporary Restraining Order and Permanent Injunction; and, on Motion of the Defendants, John Dalton, the Secretary of the Navy, et al., to Dismiss or for Summary Judgment (Docket Nos. 7-1, 7-2), and on Cross Motion of the Plaintiff, for Summary Judgment (Docket No. 9-1). Also before the Court is the

Motion of the Defendants to Strike certain documents submitted by the Plaintiff (Docket No. 15-1).

I. Procedural Background

The injunctive relief sought by the plaintiff in this action requests that the Court enter and order finding that the plaintiff may not be separated and discharged from the Navy. Previously, this Court entered a temporary restraining order in this cause on October 5, 1998, which was thereafter extended by agreement of the parties on October 20, 1998, and enjoined the defendants from separating, discharging, or releasing the plaintiff from active duty in the United States Navy until a hearing could be held in this matter. Thereafter, the parties filed the above cited dispositive motions. The Court reviewed the arguments of the parties in their respective motions, and ordered further briefing on March 1, 1999, on the issue, *vel non,* of exhaustion of the remedies by the plaintiff; the parties have now submitted the requested information, and the Court is of the opinion that, based upon

the record, and the relevant case law, as set forth herein, that the injunctive relief ordered by this Court should be dissolved, that the further injunctive relief requested by the Plaintiff should be denied, and that the Defendants' Motion to Dismiss, or for Summary Judgement, and Motion to Strike, should be granted, and the Plaintiff's Cross Motion for Summary Judgment should be denied.

II. Statement of Facts

The Plaintiff enlisted in the Navy on August 2, 1984, and has served continuously since that date. A.R. 118, 189-195.[1] On January 24, 1997, the plaintiff was arrested in Biloxi, Mississippi, for indecent exposure. The police report describes that the plaintiff, while parked outside of Gayfer's

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[1] "A.R. ____" refers to the numbered page or pages of the administrative record submitted with Defendants' motion. The administrative record in this case is 281 pages long; it contains (1) a copy of the file maintained at the Bureau of Naval Personnel concerning Plaintiff's separation, and (2) a copy of Plaintiff's service record. See Exhibits A&C, B, D, E, and F, file-stamped into the record on December 1, 1998.

Department Store, was seen by a male Gayfer's Department Store employee masturbating while female employees walked past his truck. A.R. 80. The employee made the following statement:

> I observed his pants down to his knees and his underwear as well. I observed him masturbating as the female associates were walking past his truck. At his point mall security was contacted. Upon their arrival to the location, I detained the subject and placed him under a citizens arrest for indecent exposure.

A.R. 80, 81.

The Plaintiff was arrested and transported to the Biloxi Police Department. He was booked for "Indecent Exposure Exhibiting." A.R. 78.

On March 31, 1997, the plaintiff appeared before Judge Tisdale in the Biloxi Municipal Court. A.R. 76. The "Abstract of Court Record" indicates that plaintiff initially plead not guilty to indecent exposure. *Id.* However, the ultimate disposition was "Guilty $212", indicating that he modified his plea, was found guilty in accordance therewith,

and paid a $212 fine. *Id.*

On May 14, 1997, the plaintiff was notified that he was being considered for an administrative separation form the naval service by reason of "misconduct due to a civilian conviction as evidenced by your conviction of 31 March 97." A.R. I, 22.[2] The Plaintiff was advised that he had a right to consult with qualified counsel, submit statements to the administrative board or the separation authority in lieu of a hearing, obtain copies of documents that would be forwarded to the separation authority, request an administrative board hearing, and be represented by counsel before the administrative board. A.R. 22-23.

On May 23, 1997, plaintiff completed an acknowledgment form in which he requested an

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[2]The administrative separation of enlisted personnel in the Navy is governed by Chapter 36 of the Military Personnel Manual (hereinafter referred to as "MILPERSMAN"), which implements Secretary of the Navy Instruction (hereinafter referred to as "SECNAVINST") 1910.4B. See regulations, Appendices A and B, respectively.

administrative board, and representation by qualified counsel. A.R. 24. He also elected "(t)o obtain copies of documents that will be forwarded to the Chief of Naval Personnel supporting the basis for the proposed separation." *Id.*

On June 7, 1997, while deployed in Okinawa, Japan, the plaintiff's commanding officer appointed three officers to serve as members at the plaintiff's board. He also appointed officers to serve as recorder[3] and counsel for respondent. A.R. 20. The commanding officer's appointing order was subsequently modified to note that the officer slated to appear as recorder was replaced by a Chief Warrant Officer who was not an attorney. A.R. 10, 21.

On June 19, 1997, while plaintiff's command was still located in Okinawa, an administrative board was held to consider the plaintiff's case. The plaintiff appeared with his

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[3] "Recorders" at administrative boards are responsible for presenting evidence to the board members in support of the proposed separation.

lawyer, and was advised of his rights under the MILPERSMAN. A.R. 9-19. The plaintiff was told that he was being processed for administrative separation from the United States Navy by reason of misconduct due to a civilian conviction. A.R. 10. The recorder presented the governments's exhibits, which included applicable pages from plaintiff's service record (A.R. 14, 26-74); a copy of the police report and "Abstract of Court Record" verifying that plaintiff had been adjudged guilty of indecent exposure (A.R. 14, 76-84); and excerpts of the MILPERSMAN sections governing "SEPARATION OF ENLISTED PERSONNEL BY REASON OF MISCONDUCT-COMMISSION OF A SERIOUS OFFENSE" (A.R. 85-86); "GUIDELINES ON CHARACTERIZATION OF SERVICE AND UNCHARACTERIZED SEPARATIONS" (A.R. 87-90); and "SEPARATION OF ENLISTED PERSONNEL BY REASON OF MISCONDUCT-CIVILIAN CONVICTION" (A.R. 91).

Appendix 8

Counsel for the plaintiff presented several exhibits including excerpts from the Manual for Courts-Martial, a photograph of plaintiff's vehicle, and several character witness statements. A.R. 14, 92-115. He also presented the testimony of several character witnesses who supported plaintiff and recommended his retention in the Navy. A.R. 111-115. Additionally, the plaintiff explained to the board that although he pleaded guilty to indecent exposure, he was not masturbating in his truck. Rather, he recounted that while reading in his car he felt the urge to urinate, and, because it was raining and he didn't want to get wet, he leaned out of his truck and urinated.[4]

During final argument, counsel for respondent argued that plaintiff should be retained in the Navy. A.R. 16. He

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[4]At his administrative board, plaintiff argued that he pleaded guilty to indecent exposure, but only because he wanted to speed up the process and avoid the expense of hiring an attorney. However, he admitted that he knew that he was accused of masturbating and confirmed that he pleaded guilty. A.R. 114.

asserted that plaintiff had not committed misconduct. *Id.* The recorder argued that plaintiff should be separated, and that "the circumstances surrounding his conviction, which was that he was seen masturbating to women as they walked by, cannot be disputed." *Id.*

The Board made a written finding that the evidence presented at the Board did not support the basis for separation. A.R. 18. When questioned by the recorder, the Board opined that no evidence was submitted to show that Petty Officer Konwinski had the intent to victimize another individual. They did, however, find that Petty Officer Konwinski was "guilty of resoundingly poor judgement," but that this did not warrant separation. A.R. 17. The Board recommended that Petty Officer Konwinski be retained on active duty. A.R. 18.

Upon a request for clarification of the report of the Board, the Senior Member stated that, "the Board did not discount the civil conviction and acknowledge(d) such, but

the members by a vote of 3 to 0 didn't believe that PO Konwinski was masturbating in his vehicle, but was urinating out of his vehicle." *Id.* The recorder then informed the Board that "per paragraph 3630610.2a, the board must enter a finding of misconduct due to a civilian conviction." *Id.* In response, the Senior Member indicated that the Board's findings as written are the findings that the Board "intends to submit." *Id.* The Board was then adjourned. *Id.*

On September15, 1997, Commanding Officer U.S. Naval Mobile Construction Battalion Seven completed a note to file in which he concurred with the findings and recommendations of the Administrative Board, but did not forward to the board an authorized separation authority as he was required per MILPERSMAN § 3610220 to do. A.R. 8.

On October 30, 1997, plaintiff detached from U.S. Naval Mobile Construction Battalion Seven, and joined Naval Construction Battalion Center, in Gulfport, Mississippi. A.R. 6-7; 219-220.

On July 23, 1998, Commanding Officer, Construction Battalion Center forwarded the results of the board to the Chief of Naval Personnel. In his letter, he noted that the findings of the Board were improper, but nevertheless recommended that plaintiff be retained in the naval service:

> MS1 Konwinski was attacked to NMCB-7 when he was arrested and eventually pled guilty to (indecent exposure). His Battalion deployed to Japan, where his administrative board was held. The U.S. Marine Corps provided the recorder and counsel for the respondent for the proceedings. Contrary to his plea and the guidance of the MILPERSMAN, the board members made an improper finding of no misconduct. They did, however, proceed forward and made a recommendation to retain. After the board, the record of proceedings was not forwarded (to the Bureau of Naval Personnel). Shortly thereafter, MS1 Konwinski was given orders to my command. In the several months MS1 Konwinski has been onboard, he has performed his duties at a superior level. I do not concur in the boards member's finding of no misconduct. This was clearly inappropriate. Although I believe his misconduct is serious, based upon the input of my staff and the MILPERSMAN factors, I concur with the board's recommendation to retain.

A.R. 6,7.

On August 10, 1998, the Chief of Naval Personnel,

acting through CDR S.T. Johnson, Head, Enlisted Performance Branch, Bureau of Naval Personnel, sent plaintiff's administrative separation package to the Assistant Secretary of the Navy for Manpower and Reserve Affairs ("ASN (M&RA)"). (See Exhibit E). The Chief of Naval Personnel noted its nonconurrence with the recommendations of the Administrative Board and Commanding Officer, and recommended that plaintiff be separated with a General discharge (under honorable conditions). The recommendation stated that the Administrative board "had before it evidence which demonstrates an incompatibility with further military service. Specifically, MS1 Konwinski was found guilty in the Municipal Court of the City of Biloxi of indecent exposure." A.R. 1.

The Assistant Secretary of the Navy for Manpower and Reserve Affairs approved the Chief of Naval Personnel's separation recommendation on September 18, 1998. *Id.* The Plaintiff was subsequently notified that he would be separated

from the Navy within 10 days. A.R. 2-3. On October 5, 1998, the plaintiff filed the suit now pending before this Court asking for injunctive relief enjoining the Navy from completing his separation. As of this date, there is nothing in the record reflecting that a petition was ever filed with the Board for Corrections of Naval Records (hereinafter "BCNR"). See Declaration of W. Dean Pfeiffer, Exhibit D, p.2.

III. Jurisdiction

The Defendants contention that jurisdiction is not properly before this Court alleging that the Plaintiff has not exhausted his administrative remedies; and, allege further that should the Court find that the exhaustion of the Plaintiff's remedies is not required, that the Plaintiff's claims are nonjusticiable.

The record reflects that the Plaintiff has failed to appeal for relief with the Board of Correction of Naval Records (the "BCNR") regarding the final decision to

separation him from the Navy. The final review board found that his misconduct was wrongful but that he should be retained; the Plaintiff submits that he did not appeal this decision to the BCNR because it was not adverse to him. Further, the regulations reflect that the Secretary of the Navy had the final authority to retain or discharge the Plaintiff and that the Secretary's decision is not reviewable by the BCNR. Accordingly, such an appeal or "exhaustion" would not be required to obtain judicial review under the APA. *See Noel Brown v. Richard Danzig, et al.*, Civil Action No. 1:99cv161GR (May 21, 1999) (S.D.Miss.); *Merritt v. Dalton*, 1998 WL 53943 (N.D. Fla); *Ostrow v. Secretary of the Air Force*, 1995 WL 66752 (D.C. Cal 1995); *Watson v. Perry*, 918 F.Supp. 1403, 1411 (W.D. Wash. 1996) aff'd 124 F.3d 1126 (9th Cir. 1997). Accordingly, the Court may exercise jurisdiction and will address the justiciability of the Plaintiff's claims.

IV. Justiciability of Plaintiff's Claims

The complaint makes clear that jurisdiction is this matter is based on the Administrative Procedure Act ("APA"); the APA waives sovereign immunity for an action "seeking relief other than money damages", 5 U.S.C. § 702, and provides for judicial review of any "final agency action for which there is no other adequate remedy in a court". 5 U.S.C. § 704. As this case involves a challenge to a military decision, the plaintiff must demonstrate that the decision is reviewable under the test established by *Mindes v. Seaman*, 453 F.2d 197 (5th Cir. 1971).

The Supreme Court of the United States held in *Chappell v. Wallace*, 462 U.S. 296, 304, 103 S.Ct 2362, 2367 (1983), that enlisted military personnel are precluded from maintaining suits against superior officers to recover damages for injuries resulting from violations of constitutional rights in the course of military service. Thus, the United States Court of Appeals for the Fifth Circuit ("Fifth Circuit") in *Mindes, supra*, employed a multi-factor test to determine

whether a particular constitutional claim asserted by members of the armed forces against their superiors is barred from the suit.

To obtain review of an internal military decision, a plaintiff must allege that the military has violated a statutory, regulatory or constitutional provision and must demonstrate that he has exhausted his available intra service remedies. *NeSmith v. Fulton*, 615 F.2d 196 (5th Cir. 1980); *Stinson v. Hornsby*, 821 F.2d 1537, 1540 (11th Cir. 1987). After the plaintiff meets this threshold, the Court must balance the affected interests to determine the propriety of review of the military decision. The factors to be examined are:

(1) The nature and strength of the plaintiff's challenge to the military determination...; (2) The potential injury to the plaintiff if review is refused; (3) The type and degree of the anticipated interference with military function...; (4) the extent to which the exercise of military expertise or discretion is involved. *NeSmith*, 615 F.2d at 196; *Stinson*, 821 F.2d at

1540.

The Plaintiff's main contentions are that he was wrongfully separated because 1) the proceedings and review of the Chief of Naval Personnel and the Secretary of the Navy were in contravention of 10 U.S.C. § 1169; 2) the results of the agency review were in contravention of the Administrative Procedures Act, 5 U.S.C. 551 *et seq.*; and 3) that the agency review process denied his of his right to due process under the Fifth Amendment to the United States Constitution. As the plaintiff has met the threshold requirements, it is necessary to consider his claims under the *NeSmith* factors to determine whether the plaintiff's claims are justiciable.

The Defendant's submit that the plaintiff cannot prevail on the four part balancing test and submit that the plaintiff's claims are nonjusticiable. Defendant's submit that firstly, regarding the nature and strength of the plaintiff's challenge to the military determination, that the Plaintiff's

case lacks merit because the decision of the Assistant Secretary of the Navy to separate the Plaintiff for his misconduct was made in accordance with agency regulations; secondly, the Defendants argue that the harm to the Plaintiff is not irreparable while, thirdly, the potential interference with Defendants' ability to efficiently manage Naval personnel is substantial as the case clearly involves the exercise of military discretion. Interference by the Court, where improper, would make the Court the ultimate decision maker on the personnel the Naval should retain. Fourthly, the administrative record reflects that significant military discretion and expertise was brought to bear in determining whether the plaintiff should be administratively discharged given his civilian conviction.

This Court is of the opinion that based upon the record and applicable law, that the case is nonjusticiable. However, because the issue of the nonjusticiability of the Plaintiff's claims are a mixed question of law and fact, out of

an abundance of caution and judicial economy, the Court will provide for the record a finding on the parties' Motions for Summary Judgment.

V. Merits of Parties' Summary Judgment Motions

Summary judgment is appropriate only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56 F.R.Civ.P. In *St. Amant v. Benoit*, 806 F.2d 1294, 1296-97 (5th Cir. 1987), the Fifth Circuit addressed the law as regards summary judgment and stated that "(t)he mere existence of a factual dispute does not by itself preclude the granting of summary judgment. '(T)he requirement is that there be no genuine issue of material fact.' *Anderson v. Liberty Lobby*, 477 U.S. (242), (248) (1986)." (Citations omitted). *See* also *Celotex Corporation v. Catrett*, 477 U.S. 317 (1986); *Professional Managers, Inc. v. Fawer, Brian,*

Hardy & Zatzkis, 799 F.2d 218, 222 (5th Cir. 1986).

Under the APA, the judiciary may set aside agency actions that are "arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706 (2)(A). "The scope of review under the 'arbitrary and capricious' standard is narrow and a court is not supposed to substitute its judgement for that of the agency." *Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43, (1983). Deference to the agency is appropriate even where the petitioner advances a more plausible reading of a statute. *General Elec. v. E.P.A.*, 53 F.3d 1324, 1327 (D.C. Cir. 1995).

The record reflects that the plaintiff was properly processed for administrative separation based on his civilian conviction for indecent exposure. Pursuant to MILPERSMAN § 3630610, "(a) member may be separated based on a conviction by civilian authorities... when... (t)he member has committed an offense for which a punitive

discharge would be authorized by the Manual for Courts-Martial for the same or closely related offense." Further, "Indecent Exposure" is an offense listed in the Manual for Courts-Martial which carries a maximum punishment of "Bad conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months." A.R. 92-93. Additionally, paragraph 1(a) of MILPERSMAN § 3630610 provides for mandatory separation processing under certain circumstances, including when a member receives a civilian conviction for an offense "involving sexual behavior that deviates from socially acceptable standards of morality and decency, including, but not limited to ...indecent exposure." Id.,¶¶ 2(b) (2) (e) and 2 (c).

Furthermore, the role of the administrative board is limited when administrative processing is based on a civilian conviction. The finding of misconduct is binding an the board only makes a recommendation of retention or separation. MILPERSMAN 3630610 (2) (a). Accordingly,

the board's finding to retain was void. The Plaintiff's board results were then later forwarded to an authorized separation authority.[5] In accordance with MILPERSMAN § 3610220 ("ADMINISTRATIVE SEPARATION AUTHORITY OF ENLISTED PERSONNEL"), if a member is processed for separation for misconduct due to civilian conviction, and the administrative board recommends retention, then the separation authority is the General Court Martial Convening Authority or higher. See also SECNAVINST 1910.4B, Part 6 of Encl. (2).

The Chief of Naval Personnel, as a command "higher" than a General Court Martial Convening Authority, was, therefore, clearly authorized to act as the separation authority in the Plaintiff's case. As set forth herein, the

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[5] A "separation authority" is "(an official authorized by the Secretary of the Navy to take final action with respect to a specified type of separation." MILPERSMAN § 3610200 (z). By contrast, a "convening authority" is merely a Commander or Commanding Officer empowered to initiate the separation process. MILPERSMAN § 3610200 (f)

separation authority did not concur with the retention recommendation of the Administrative Board as misconduct was established but the retention decisions were opposite. Accordingly, under the rules, when such a situation exists, the Secretary of the Navy through the ASN (M&RA) serves as the ultimate separation authority, and the plaintiff was properly separated for misconduct due to a civilian conviction. See MILPERSMAN 3610220, Rule 1 (d); SECNAVINST 1910.4B, Part 6 of ENCL. 2, Rule 1(d); Declaration of Commander Signe T. Johnson, Exhibit E.

The Plaintiff has raised the issue that the Secretary may have derived his authority to discharge him by reason of "Best Interest of the Service, or "BIOTS". 'BIOTS" is a unique basis for separation that may only be initiated when no other reason for separation under the MILPERSMAN is available, and it requires the use of different notification procedures and explanations (see MILPERSMAN 3640200); in the present case the Plaintiff was not processed under such

authority but instead under the MILPERSMAN 3630610.

The record reflects that the ASN (M&RA) made the ultimate decision on whether to separate the Plaintiff based on his civilian conviction for indecent exposure.[6] A.R. 1. This determination was made upon the recommendation of the Chief of Naval Personnel, and following a briefing on the matter by the Assistant Secretary of the Navy's Special Assistant for Naval Personnel. See Declaration of Dr. Bernard Rostker, ASN(M&RA), Exhibit F. In making his decision, the ASN(M&RA) considered numerous factors, including the fact that the Plaintiff's commanding officer recommended that he be retained in the Navy. *Id.*

Accordingly, this Court is of the opinion that based

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[6] The Assistant Secretary of the Navy for Manpower and Reserve Affairs is responsible for the overall supervision of manpower and reserve and the component affairs of the Department of the Navy. He is also the drafter of the general guidance contained in SECNAVINST 1910.4B. It is unquestionable that he has the authority to make administrative personnel decisions. 10 U.S.C. § 5016 and Navy Regulations § 0324. See also Appendix D

upon the record, the ASN(M&RA) had the authority to make the decision that he did, and that it was neither arbitrary or capricious. The Court also does not find merit in the Plaintiff's various other contentions in his Complaint that the separating authority, in this instance, the Assistant Secretary of the Navy, "was required to consider specific retention criteria found in 32 C.F.R. § 41 App. A Part 2 A.2.d." Complaint, p.8. The Plaintiff cites six retention factors in his footnote 4; the application of the factors is not mandatory. Further, the Plaintiff argues that Defendants Oliver and Dalton, former Secretary of the Navy and Chief of Naval Personnel, respectively, failed to consider the plaintiff's potential for rehabilitation and continuation (Complaint at p. 9); this assertion is without a basis in the record.

VI. Injunctive Relief

The temporary restraining order entered in this cause was extended by agreement until a full hearing could be had and the record fully developed and presented to the Court.

Thereafter, dispositive motions were submitted to the Court addressing the ripeness, justiciablity, and ultimately the merits of the Plaintiff's claims.

The Court does not find that the injunctive relief requested should be granted. The plaintiff has not carried the burden of persuasion. *Harris County, Texas v. CarMax Auto Superstores, Inc.*, 177 F.3d 306, 312 (5th Cir. 1999). The four requirements set forth in *CarMax* cannot be proven: firstly, the movant cannot establish a substantial likelihood of success on the merits as the Court does not find procedural error; secondly, there was a substantial threat of irreparable injury if the injunction was not granted, but the separation has been found to not have a matter into which this Court may intervene; thirdly, the threatened injury to the plaintiff must outweigh the threatened injury to the defendant and it does not as the potential interference with the defendant's ability to efficiently manage Naval personnel is great; and fourthly, the granting of a the preliminary injunction would disserve

the public interest.

Accordingly, the request for permanent injunctive relief will be denied and the temporary restraining order preventing the Defendant's from separating the Plaintiff from service will be denied and not extended.

VII. Defendants' Motion to Strike

The defendants ask the Court to strike certain documents as immaterial and impertinent to the issues before the Court; Specifically, the Defendants submit that 1) Appendix A of Plaintiff's Rebuttal Memorandum to Defendants' Reply to Plaintiff's Motion to Dismiss, or in the allternative, for Summary Judgemnt, and 2) Evaluation Report and Counseling Record for the period of 30 November 1997 to 15 November 1998, were made after the decision to separate the Plaintiff. The Court is in agreement with the Defendants the administrative it must review is "the record in existence at the time the agency committed itself to a particular course or decision." *See Citizen Advocates For*

Responsible Expansion, Inc. v. Dole, 770 F.2d 423, 434 (5th Cir. 1985). Accordingly, the motion of the Defendants will be granted.

IT IS THEREFORE, ORDERED AND ADJUDGED that the orders of October 5, 1998, October 20, 1998, and March 1, 1999, granting and extending the motion for Temporary Restraining Order be, and hereby are, **DISSOLVED AND DISMISSED,** and any other requests for preliminary or permanent injunctive relief be, and hereby are, **DENIED.**

IT IS FURTHER ORDERED AND ADJUDGED that the Motion of the Defendants, John Dalton, the Secretary of the Navy, et al., to Dismiss or for Summary Judgment (Docket Nos. 7-1, 7-2), be and hereby is, **GRANTED**, and the Cross Motion of the Plaintiff, for Summary Judgment (Docket No. 9-1), be, and hereby is **DENIED;**

IT IS FURTHER ORDERED AND ADJUDGED

that the Motion of the Defendants to Strike certain documents submitted by the Plaintiff (Docket No. 15-1) be, and hereby is, **GRANTED.**

SO ORDERED AND ADJUDGED this the 24th day of August, 1999.

DAN M. RUSSELL, JR.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

KEVIN C. KONWINSKI
PLAINTIFF

VERSUS CIVIL ACTION NO. 1:98-CV-458 RG

JOHN DALTON, Secretary
of the Navy, *et al*
DEFENDANTS

FINAL JUDGEMENT

As a memorandum Opinion and Order have been entered on August 24, 1999, incorporated herein by reference, dissolving and dismissing the Temporary Restraining Order entered in this cause on October 5, 1998, and extended on October 20, 1998 and March 1, 1999; denying all other injunctive relief; granting the Defendant' Motion to Dismiss, or for Summary Judgment, and Motion to Strike; and denying and the Plaintiff's Cross Motion for Summary Judgment;

IT IS, THEREFORE, ORDERED AND ADJUDGED that as all the claims and rights and

liabilities of all the parties have been adjudicated in this cause, that this Final Judgement shall be entered in accordance with the foregoing Memorandum Opinion and Order of August 24, 1999, pursuant to Rule 58 of the Federal Rules of Civil Procedure, and that each party shall bear their own costs

SO ORDERED AND ADJUDGED this the 24th day of August, 1999.

DAN M. RUSSELL, JR.
UNITED STATES DISTRICT JUDGE

TEXT OF PERTINENT CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS

5 U.S.C. § 702. Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: Provided, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

5 U.S.C. § 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

10 U.S.C. § 890. Art. 90. Assaulting or willfully disobeying superior commissioned officer

Any person subject to this chapter who–

(1) strikes his superior commissioned officer or draws or lifts up any weapon or offers any violence against him while he is in the execution of his office; or

(2) willfully disobeys a lawful command of his superior commissioned officer;

shall be punished, if the offense is committed in time of war, by death or such other punishment as a court-martial may direct, and if the offense is committed at any other time, by such punishment, other than death, as a court-martial may direct.

10 U.S.C. § 1169. Regular enlisted members: limitations on discharge

No regular enlisted member of an armed force may be discharged before his term of service expires, except--

(1) as prescribed by the Secretary concerned;

(2) by sentence of a general or special court martial; or

(3) as otherwise provided by law.

28 U.S.C. § 1254. Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

32 C.F.R. Pt. 41 App. A Part 2 A2.b

Unless separation is mandatory, the potential for rehabilitation and further useful military service shall be considered by the Separation Authority and, where

applicable, the Administrative Board. If separation is warranted despite the potential for rehabilitation, consideration should be given to suspension of the separation, if authorized.

32 C.F.R. Pt. 41 App. A. Part 2 A.2.d:

The following factors may be considered on the issue of retention or separation, depending on the circumstances of the case:

(1) The seriousness of the circumstances forming the basis for initiation of separation proceedings, and the effect of the member's continued retention on military discipline, good order, and morale.

(2) The likelihood of continuation or recurrence of the circumstances forming the basis for initiation of separation proceedings.

(3) The likelihood that the member will be a disruptive or undesirable influence in present or future duty assignments.

(4) The ability of the member to perform duties effectively in the present and in the future, including potential for advancement or leadership.

(5) The member's rehabilitative potential.

(6) The member's entire military record.

(a) This may include:

1 Past contributions to the Service, assignments, awards and decorations, evaluation ratings, and letters of commendation;

2 Letters of reprimand or admonition, counseling records, records of nonjudicial punishment, records of conviction by court-martial and records of involvement with civilian authorities; and

3 Any other matter deemed relevant by the Board, if any, or the Separation Authority, based upon the specialized training, duties, and experience of persons entrusted by this part with recommendations and decisions on the issue of separation or retention.

32 C.F.R. § 700.802 Responsibility.

(a) The responsibility of the commanding officer for his or her command is absolute, except when, and to the extent, relieved therefrom by competent authority, or as provided otherwise in these regulations. The authority of the commanding officer is commensurate with his or her responsibility. While the commanding officer may, at his or her discretion, and when not contrary to law or regulations, delegate authority to subordinates for the execution of details, such delegation of authority shall in no way relieve the commanding officer of his or her continued responsibility for the safety, well-being, and efficiency of the entire command.

(b) A commanding officer who departs from his or her orders or instructions, or takes official action which is not in accordance with such orders or instructions, does so upon his or her own responsibility and shall report immediately the circumstances to the officer from whom the prior orders or instructions were received. Of particular importance is the commanding officer's duty to take all necessary and appropriate action in self-defense of the command.

SECNAVINST 1910.4B Part 6 to enclosure (2) ¶2c(1) page 6-7

If the Board finds a preponderance of evidence does

not support one or more of the reasons for separation alleged and recommends retention the separation authority cannot separate the servicemembers for that alleged reason.

MILPERSMAN 1910-404. Notice of Administrative Board Procedure

Responsible Office COMNAVPERSCOM (PERS-83)

Phone: DSN 882-4438
COM (901) 874-4438
FAX 882-2624

Notice This document combines the Letter of Notification and Statement of Awareness. The processing command will retain a signed copy pending receipt of member's response. When the member responds, the command will maintain the original for the administrative separation (ADSEP) package. The member will be given a completed, signed copy. If additional space is required, list reasons, etc., on a separate page and attach.

ADMINISTRATIVE SEPARATION PROCESSING NOTICE - ADMINISTRATIVE BOARD PROCEDURE
DATE
From: UIC
To:
REASON(S) FOR ADMINISTRATIVE SEPARATION PROCESSING MILPERSMAN REF
1)
2)
3)
The least favorable characterization of service possible is Under Other Than Honorable. If your separation is approved it will result in discharge, suspended discharge, release from active duty to a Reserve component, transfer from the

Selected Reserve to the Individual Ready Reserve (IRR), or release from custody or control of the U.S. Navy.

YOU ARE ENTITLED TO THE BELOW RIGHTS (INITIAL APPROPRIATE BLOCK) ELECT WAIVE

To consult with qualified counsel. You may consult with civilian counsel retained at your own expense. (Non lawyer counsel may be appointed as determined by the commanding officer.)

To submit statements to the administrative board or to the separation authority in lieu of a board.

To obtain copies of documents that will be forwarded to the separation authority supporting the basis for the proposed separation. (Classified documents will be summarized in unclassified from.)

To request an administrative board. (Failure to appear without good cause constitutes a waiver of the right to be present at the administrative board.)

To representation at the administrative board by qualified counsel.

To representation at the administrative board by civilian counsel at your own expense.

If applicable - to request transfer to the Fleet Reserve/Retired/Retired Reserve List understanding that you have the right to an administrative board to recommend retirement at your current pay grade and if you waive such board, a reduction to the next inferior paygrade upon transfer may be directed if you are being processed for misconduct, security, or homosexual conduct.

To present evidence demonstrating that you do not engage in, attempt to engage in, have a propensity to engage in, or intend to engage in homosexual acts. ***(For homosexual statement processing only.)***

ADDITIONAL NOTICE

If you commence a period of unauthorized absence subsequent to receiving this notice, the administrative separation processing may continue in your absence.

For members on active duty not in civilian confinement: You are advised that separation proceedings in your case will be suspended for a period of 2 days from the date this notice is delivered to you personally in order to give you a reasonable opportunity to exercise the rights set forth herein. Failure to respond will constitute a waiver of all rights and processing may continue in your absence.

For members who are Reservists not on active duty: You are advised that separation proceedings in your case will be suspended for a period of 30 days from the date this notice is delivered to you personally or received at your designated mailing address in order to give you a reasonable opportunity to exercise the rights set forth herein. Failure to respond will constitute a waiver of all rights and processing may continue in your absence.

If your separation involves transfer to the IRR, you are advised that the characterization of service upon transfer to the IRR also will constitute the tentative characterization of service upon discharge at the completion of the naval service obligation, unless you take affirmative action to affiliate with a drilling unit of the Selected Reserve; and you participate satisfactorily as a drilling member of the Selected Reserve for a period of time which, when added to any prior satisfactory

service during this period of obligated service, equals the period of obligated service. If you submit evidence of completion of the above, the separation authority may assign a more favorable characterization of service. If you do not submit such evidence, the chracterization of service is the same as the characterization of service upon transfer from active duty or the Selected Reserve to the IRR. If you are in records review (non-drilling) status, you are entitled to permissive (no-cost) orders to attend any administrative board hearing to which you may be entitled.

For members subject to reimbursement: You are advised that you may be subject to a reimbursement requirement for recoupment of advance education assistance costs, bonuses, or special pays.

For members in civil confinement: You are advised that separation proceedings in your case will be suspended for a period of 30 days from the date this notice is delivered to you personally or received at your confinement address in order to give you a reasonable opportunity to exercise the rights set forth herein. Failure to respond will constitute a waiver of all rights and processing may continue in your absence. If you are eligible and have elected an administrative board, and you are unable to make arrangements which would allow you to appear in person before the board, the proceedings will continue in your absence; in this event, however, you may be represented before the board by your counsel. The below named counsel has been appointed your military counsel for consultation and/or representation for this action.

NAME OF MILITARY COUNSEL ADDRESS OF MILITARY COUNSEL PHONE

CIVILIAN CONVICTION APPEAL INFORMATION

(RESPONDENT INITIAL APPROPRIATE BLOCK)
YES NO N/A
Do you intend to file an appeal?

Do you request separation before your appeal is decided or the time for appeal has passed?

COMMAND CERTIFICATION SIGNATURE DATE
Commanding Officer or "By direction"

MEMBER CERTIFICATION
I acknowledge receipt of this notice.
My response to this notice is complete.

COUNSEL CERTIFICATION
(if applicable)